Supreme Court, U.S.
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No. 10-638

IN THE

Supreme Court of the United States

NANCY J. WETHERILL,
Petitioner,

v.

JOHN MCHUGH, SECRETARY OF THE ARMY; THE ARMY NATIONAL GUARD; STEVEN R. DOOHEN, BRIGADIER GENERAL, IN HIS OFFICIAL CAPACITY AS ADJUTANT GENERAL OF THE SOUTH DAKOTA NATIONAL GUARD; THEODORE JOHNSON, BRIGADIER GENERAL, IN HIS OFFICIAL CAPACITY; AND THE SOUTH DAKOTA ARMY NATIONAL GUARD,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY TO STATE RESPONDENTS' BRIEF IN OPPOSITION

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THE WRIT SHOULD BE GRANTED

Petitioner established in the petition and the reply that an irreconcilable split is presented by this case – whether dual-status technicians are civilian employees who may raise Title VII claims. Petitioner also established the related split whether, even if *Feres* is applicable (contrary to what the Federal Circuit has held is the meaning of the plain language of the dual-status technician statute), a Title VII claim nevertheless can be brought by a dual-status technician when the claim is not "incident to military service."

State respondents do not dispute the irreconcilable splits on these issues; indeed, they do not even address them. Instead, they argue that their role in terminating petitioner – even if discriminatory – is shielded from scrutiny by sovereign immunity under a combination of the Second, Tenth, and Eleventh Amendments. This argument, however, fails to state a compelling basis for denying review. First, state respondents' argument says nothing at all about the claims against federal respondents; it applies only to state respondents and can, if necessary, be addressed in the first instance on remand after the threshold issue is resolved. Second, state respondents' argument is waived because it was not presented in the court of appeals. Third, state respondents' argument is meritless – it is meritless regarding the Eleventh Amendment because, as this Court has squarely held, Congress abrogated sovereign immunity in enacting Title VII; and it is meritless regarding the Second and Tenth Amendments because state respondents' contentions lack support in precedent or constitutional principle.

1. State respondents' brief simply does not address the split in authority over the question presented by this case: whether the claims of a dual-status National Guard technician alleging employment discrimination under Title VII of the Civil Rights Act of 1964 are jurisdictionally barred by the doctrine of *Feres v. United States*, 340 U.S. 135 (1950), and its progeny. See Pet. i, 8-12; see also State's Brief in Opposition ("SBIO") 6 (adopting federal respondents' arguments by reference). As set forth in petitioner's prior briefing, this case implicates two separate and square splits in the lower courts over the application of the *Feres* doctrine to dual-status technicians – whether *Feres* applies at all to dual-status technicians and, if so, how. The splits are important and entrenched, and they continue to produce divergent results in the lower courts. They also affect a large body of federal employees – nearly 70,000 in number. See H.R. Rep. 111-288 § 413, at 79 (2009). For these reasons, the Court should grant review and resolve this important issue.

2. Nor does state respondents' brief present any argument that would justify denial of the petition. State respondents raise arguments that apply only to them – not to federal respondents. See SBIO 18 n.3 (acknowledging that their arguments could not be raised by federal officials). Thus, if the Court granted review and petitioner prevailed, that decision would have an outcome-determinative effect on her ability to proceed against federal respondents. To the extent state respondents have an additional defense, they would be free to present it below. Notably, the defense proffered in state respondents' brief sounds in sovereign immunity and is not a jurisdictional question. See, *e.g.*, *Wis. Dep't of*

Corrections v. Schacht, 524 U.S. 381, 389 (1998) (state can waive Eleventh Amendment immunity by its conduct of litigation). Thus, the district court proceeded properly in first addressing the controlling *Feres* issue – which it thought to be jurisdictional in nature. Pet. App. B, at 38a. In similar circumstances in other cases, this Court has resolved threshold jurisdictional questions and remanded for further consideration of other potential defenses. See, *e.g.*, *Verlinden B.V. v. Cen. Bank of Nigeria*, 461 U.S. 480, 497-98 (1983) (determining that the grant of jurisdiction in the Foreign Sovereign Immunities Act was constitutional and then remanding the case to the court of appeals to consider claim of sovereign immunity in the first instance).[1]

3. State respondents' sovereign-immunity argument is waived. State respondents made no sovereign-immunity argument at all in their eight-page brief before the court of appeals. There is no question that while the "Eleventh Amendment grants the State a legal power to assert a sovereign immunity defense *should it choose to do so*," the "State can waive the defense." *Schacht*, 524 U.S. at 389. It is a

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[1] In an apparent effort to avoid review, state respondents also suggest their arguments would be "inapplicable" to another petition before the Court. SBIO 18 n.3 (citing *Zuress v. Donley*, No. 10-374 (filed Sept. 16, 2010)). But state respondents' arguments are just as "inapplicable" to the federal respondents in this case. Moreover, the instant case presents a second, important split squarely and prominently: whether, even if *Feres* applies, Title VII claims by dual-status technicians may be brought when the discrimination claims are not incident to military service. See Pet. 9-12, 17-23.

settled principle that a state's waiver of sovereign immunity may be "effected by litigation conduct." *Lapides v. Bd. of Regents*, 535 U.S. 613, 620 (2002). And "[w]here issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them," *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212-13 (1998) (citation and internal quotation marks omitted) (declining to address question whether Congress had exceeded its authority under § 5 of the Fourteenth Amendment), even when the issue was presented in the district court, see, *e.g.*, *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 148 n.2 (1970) (declining to consider an issue that the party raised in the district court but abandoned on appeal).[2]

4. State respondents' argument also is clearly wrong on the merits. It is well established that "Congress . . . abrogat[ed] States' sovereign immunity in Title VII of the Civil Rights Act of 1964." *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 729 (2003). State respondents acknowledge this fundamental point, SBIO 17-18, but argue that the "facts and circumstances" of this case warrant a unique exception

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[2] Waiver applies here with particular force to the extent state respondents raise distinct defenses under the Second and Tenth Amendments, see SBIO 10-11. These amendments were never invoked at all below, either in the court of appeals or the district court. With regard to the Eleventh Amendment, the state raised it in the district court, see Defs. Steven R. Doohen, Theodore Johnson, and the S.D. Army Nat'l Guard's Mem. in Supp. of Mots. to Dismiss, D.10, at 4, *Wetherill v. Geren*, No. 5:08-cv-5077-KES (D.S.D. filed Nov. 26, 2008), but never raised it in the court of appeals.

for state adjutants general in light of "those preexisting and fundamentally inherent attributes of sovereignty preserved by the implicit promise of the Eleventh Amendment and other constitutional provisions," specifically the Second and Tenth Amendments and the Militia Clauses of the Constitution. SBIO 18. But petitioner is aware of no case that has ever so held – and state respondents cite none.[3] In contrast, a number of courts have considered Title VII claims brought by National Guard employees against state defendants. See, *e.g.*, *Meister v. Tex. Adjutant Gen.'s Dep't*, 233 F.3d 332, 338 (5th Cir. 2000) (reversing dismissal in suit brought by civilian state employee alleging sexual harassment); *Thornton v. Coffey*, 618 F.2d 686, 690 (10th Cir. 1980) (affirming judgment in favor of national guardsman bringing Title VII claim for racial

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[3] As state respondents' own authority acknowledges, the Militia Clauses do not strengthen the argument. This Court rejected similar claims of state primacy over the militia in *Perpich v. U.S. Dep't of Def.*, 496 U.S. 334 (1990). See SBIO 11 (citing *Perpich*). In *Perpich*, the Governor of Minnesota argued that Congress violated states' rights by authorizing the President to order members of the National Guard to active duty outside the United States during peacetime, relying chiefly on the Militia Clauses and the history behind them. 496 U.S. at 336. This Court rejected the argument, explaining that, "far from being a limitation on [Congress's] powers" (as is asserted in this case), "the Militia Clauses are – as the constitutional text plainly indicates – additional grants of power to Congress." *Id.* at 349. Two of the express grants of power are the authority to "'disciplin[e]'" and "'prescrib[e]'" discipline for the militia. *Id.* at 350 (quoting U.S. Const. art. I, § 8, cls. 15-16).

discrimination against National Guard); *Moore v. Pa. Dep't of Mil. & Veterans Affairs*, 216 F. Supp. 2d 446, 452 (E.D. Pa. 2002) (explaining that while Title VII does not abrogate sovereign immunity as to claims by military members of the National Guard, it does abrogate sovereign immunity as to Title VII claims brought by civilian employees in the National Guard against state defendants); *Hunter v. Stetson*, 444 F. Supp. 238, 239-40 (E.D.N.Y. 1977) (rejecting motion to dismiss Title VII claim against state officials brought by member of New York Air National Guard member); *Napper v. Schnipke*, 393 F. Supp. 379, 385 (E.D. Mich. 1975) (granting relief to a mechanic in the Michigan Air National Guard against state adjutant general under Title VII); see also, *e.g.*, *Lipscomb v. Fed. Labor Relations Auth.*, 333 F.3d 611, 618 (5th Cir. 2003) (rejecting similar sovereign-immunity claim as to the Federal Service Labor-Management Relations Act because the state adjutant general "assumes" a "federal character . . . under the Technicians Act"). Petitioner is aware of no cases to the contrary (and, again, state respondents cite none).[4] Accordingly, even if it were not waived, state

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[4] State respondents further argue that, consistent with their view of the constitutional principles, 32 U.S.C. § 709(f) must be read as limiting all challenges to employment decisions by dual-status technicians to appeals to the state adjutant general. SBIO 11. This argument also fails. First, it is waived because it was not raised in any of the courts below. Second, as noted in the text, courts have entertained Title VII claims against state militia officials, and state respondents once again fail to cite any precedent showing that any court has ever barred such a claim under 32 U.S.C. § 709(f). Third, the National Guard statute does not purport to bar claims for discrimi-

respondents' argument is wrong and poses no barrier to review. Again, moreover, state respondents would be free to raise any claim or defense on remand after this Court resolves the threshold issue regarding federal respondents.

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nation or retaliation, for which Title VII expressly extends protection as to "[a]ll personnel actions affecting employees or applicants for employment . . . in military departments." 42 U.S.C. § 2000e-16(a). The only case cited by state respondents – *Alexander v. United States*, 143 F. App'x 340 (Fed. Cir. 2005) (per curiam), see SBIO 15 – is not a Title VII case.

CONCLUSION

For the foregoing reasons and for those set forth in the opening brief and in the reply to the federal respondents' brief in opposition, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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